

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF-PJC
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA’S RESPONSE IN OPPOSITION TO DEFENDANT
CAL-MAINE FOODS, INC.’S MOTION *IN LIMINE* REGARDING
REFERENCE TO BENTON COUNTY FOODS, LLC AND INTEGRATED
BRIEF Dkt No. [2409]**

COMES NOW Plaintiff the State of Oklahoma (“State”) and for its response in opposition to Cal-Maine Foods, Inc.’s (“Cal-Maine”) Motion in Limine Regarding Reference to Benton County Foods, LLC (“BCF”) and Integrated Brief (Dkt No. [2409]), respectfully submits that the Motion should be denied for the reasons stated herein. Cal-Maine seeks to exclude any reference to BCF at the trial of this matter, claiming that any such reference will confuse the jury and work a prejudice against Cal-Maine. Cal-Maine, without any factual reference in support thereof, complains that the State may try to “prove that the actions of [BCF] are attributable to Cal-Maine.” (Cal-Maine’s Motion at 3). However, reference to Cal-Maine’s operation in the IRW through its wholly owned subsidiary, BCF, is appropriate and should not be limited for the reasons set forth below.

I. DEFENDANT'S RELIANCE ON *BEST FOODS* AS DISPOSITIVE FOR VICARIOUS LIABILITY BETWEEN PARENT AND SUBSIDIARY IS MISGUIDED AND OVERLY NARROW.

In support of the proposition that it is not vicariously liable for the actions of BCF in the IRW, Cal-Maine relies solely on *United States v. Best Foods, et al.*, 524 U.S. 51 (1998). However, in that case, the Supreme Court held that a parent company may be held vicariously liable under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 42 U.S.C.S. § 9601, et seq. The corporate veil may be pierced and the parent held liable for the subsidiary's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes on the parent's behalf. *Id.* at 52.

There are several distinctions that differentiate the current case from *Best Foods* and its progeny. Foremost, the State's cause of action in this case is not confined to CERCLA. In *Best Foods*, the plaintiff (the United States) sued a chemical company under CERCLA for discharges of industrial waste. Accordingly, the Court's analysis was restricted to CERCLA claims only. In ultimately determining that a CERCLA claim was not viable in that particular case, the Court analyzed the term "operator" in the CERCLA statutes and determined that the defendant was not liable for the discharges by its subsidiary. In the case at bar, the State has made a CERCLA claim against Cal-Maine and other Defendants, but there are several other claims in this lawsuit as well. In grounding their entire defense on *Best Foods* and CERCLA, Cal-Maine has ignored vicarious liability under Oklahoma law for other claims. Further, since CERCLA is no longer at issue as the case currently stands, this point is now moot.

II. CAL-MAINE FOODS' OWNERSHIP AND OPERATION OF BENTON COUNTY FOODS, LLC EVIDENCES "CONTROL" FOR PURPOSES OF ESTABLISHING VICARIOUS TORT LIABILITY UNDER OKLAHOMA LAW.

The relationship between Cal-Maine and BCF is more than mere parent-sub subsidiary. Cal-Maine created BCF in 2007 for the sole purpose of acquiring the egg production facilities of George's Inc. in the IRW. *See* fn. 3 *infra*. Additionally, Cal-Maine provides BCF with all of its chicks and many Cal-Maine executives serve in similar executive capacities for BCF. *See* fn. 2, 4 *infra*. This overlap of operations demonstrates that Cal-Maine should be held vicariously liable for the actions of BCF, its wholly owned and controlled subsidiary, under Oklahoma law.

If a subsidiary corporation is merely an instrumentality of its parent, corporate distinctions are disregarded and the parent and subsidiary are treated as one for purposes of liability. *Frazier v. Bryan Memorial Hospital Authority*, 1989 OK 73, ¶16, 775 P.2d 281, 288 (citations omitted). Under Oklahoma law, courts have generally analyzed the doctrine of "piercing the corporate veil" based on a ten (10) factor control test:

whether 1) the parent corporation owns all or most of the subsidiary's stock, 2) the corporations have common directors or officers, 3) the parent provides financing to its subsidiary, 4) the dominant corporation subscribes to all the other's stock, 5) the subordinate corporation is grossly undercapitalized, 6) the parent pays the salaries, expenses or losses of the subsidiary, 7) almost all of the subsidiary's business is with the parent or the assets of the former were conveyed to the latter, 8) the parent refers to its subsidiary as a division or department, 9) the subsidiary's officers or directors follow direction from the parent corporation, and 10) legal formalities for keeping the entities separate and independent are observed.

Frazier v. Bryan Memorial Hospital Authority, 775 P.2d 281, 288 (Okla. 1989) (citations omitted); *Wallace v. Tulsa Yellow Cab Taxi & Baggage Co.*, 61 P.2d 645, 648 (Okla. 1936). This test is not meant to be a requirement that all ten elements be in place to

establish control, rather, that the totality of the evaluation of these elements indicates parent control over the subsidiary. *Oliver v. Farmers Insurance Group of Companies*, 941 P.2d 985 (Okla. 1997).

Applying the above-referenced facts to the case at bar, the evidence proves:

- a) that Cal-Maine originally owned 90% of the stock in BCF and now owns all of the stock of BCF¹;
- b) the President and the Chief Financial Officer of Cal-Maine serve as two of three board members of BCF²;
- c) Cal-Maine created BCF to acquire George's Inc. egg production in the IRW³;
- d) Cal-Maine is the sole provider of chicks to BCF⁴;
- e) Cal-Maine stores and has access to all of BCF's electronic business records at its home office in Jackson, MS⁵;
- f) Cal-Maine's stated mission or goal is to grow through acquisition (*i.e.* creation of BCF and purchase of George's Inc. egg production in the IRW)⁶;

¹ See Defendant, Cal-Maine Foods, Inc., Motion *In Limine* Regarding Reference to Benton County Foods, LLC and Integrated Brief (Dkt No. 2409) at p. 1 fn. 1 wherein Cal-Maine admits 100% ownership of Benton County Foods.

² See Ex. A (30(b)(6) Deposition of Cal-Maine Foods, Inc., Steve Storm testimony, ("Storm Depo"), taken October 8, 2007 at p. 225:12-16, 228:22-23). See also Cal-Maine Foods, Inc. website (Board and Management) <http://phx.corporate-ir.net/phoenix.zhtml?c=86814&p=irol-governance>. It is not known if the third board member of BCF still remains or was replaced by another Cal-Maine employee after Cal-Maine purchased the outstanding ten percent ownership interest.

³ See Ex. A (Storm Depo at 96:4-21).

⁴ See Ex. A (Storm Depo at 99:1-5).

⁵ See Ex. A (30(b)(6) Deposition of Cal-Maine Foods, Inc., Bob Gilmore testimony ("Gilmore Depo"), taken October 8, 2007 at p. 50:12-51:14).

- g) Cal-Maine and its subsidiaries, collectively the “Company” as stated in Cal-Maine’s Annual Report file consolidated financial statements which specifically list BCF as a wholly owned subsidiary of Cal-Maine and part of the “Company”;⁷
- h) Steve Storm Vice-President, Operations of Cal-Maine admittedly is responsible for supervision and oversight of BCF’s egg production activities which include “care of the birds and maintenance of the physical plant.”⁸

It must be noted Cal-Maine closed its previous IRW operation in 2005-2006. Cal-Maine’s re-entry into the IRW with its newly created BCF was with full knowledge of the State’s pending action which includes a prayer for injunctive relief. While Cal-Maine states it contracts with others for the disposition of the poultry waste from its 800,000 birds, it does not affirmatively declare the waste is being removed from the IRW. In fact, Gabriel Timby of Terra Renewal Services (“TRS”) testified that TRS daily removes waste from BCF’s IRW facilities and land applies it on nearby fields. *See* Ex. A (Gabriel Timby Depo at 13).

So other than the short period of time between Cal-Maine closing one operation and opening its new BCF operation in the IRW not much is different but the name. Moreover, under Fed. R. Civ. P. 65(d)(2)(C) BCF would be bound by any injunction issued by this Court. *See also* Natural Resources Defense Council, Inc. v. Texaco

⁶ *See* Ex. A (Storm Depo at 240:9-15).

⁷ *See* Ex. B (2008 Annual Report of Cal-Maine Foods, Inc. at 36 and Form 10-K for Cal-Maine Foods, Inc. filed August 11, 2009, (title page and referenced page of Annual Report and Form 10-K)).

⁸ *See* Defendant, Cal-Maine Foods, Inc., Motion *In Limine* Regarding Reference to Benton County Foods, LLC and Integrated Brief (Dkt No. 2409) at p. 2.

Refining and Marketing, Inc., 2 F.3d 493, 506 (3rd Cir. 1993) (stating that joinder of successor in interest was unnecessary to litigation as successor would be bound by any injunction entered).

Considering the above, it is evident that reference to BCF, which is defined by Cal-Maine itself as part of the “Company,” will neither confuse nor mislead the jury nor prejudice Cal-Maine in any manner. Cal-Maine’s Motion must be denied in its entirety.

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I hereby certify that on this 20th day of August, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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